(1) Supreme Court, U.S.
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No. ___

In The

Supreme Court of the United States

STEVEN M. YATES,

Petitioner,

v.

HERSHAL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit's interpretation of Clear and Unmistakable Error, as provided for in 38 C.F.R. §§ 3.105(a) and 20.1403(a), conflict with 38 U.S.C. § 5107(a) the statutory burden of proof provision, and with 38 U.S.C. § 5107(b) requirement of resolution of reasonable doubt in favor of the claimant.

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 213 F.3d 1372 (Fed.Cir. 2000) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Yates v. West*, is an unpublished opinion cited as No. 98-1336, 1999 WL 542182 (July 21, 1999) and reprinted at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on June 16, 2000.

PROVISIONS INVOLVED

38 U.S.C. § 5107. Burden of proof; benefit of the doubt

(a) Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair

and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

(b) When, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such case shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a) of this section.

38 U.S.C. § 5109A.

(a) A decision by the Secretary under this chapter is subject to revision on grounds of clear and unmistakable error. If evidence establishes the error, the decision shall be reversed and revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after the decision is made.

(e) such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

38 C.F.R. § 3.105(a)

(a) Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependence, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provision of Sec. 3.500 (b) (2) will apply.

38 C.F.R. § 20.1403 ¶ Rule 1403. What constitutes clear and unmistakable error; what does not.

(a) General. Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been

manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board or the statutory and regulatory provisions extant at the time were incorrectly applied.

(b) Record to be reviewed – (1) General. Review for clear and unmistakable error in a prior Board decision must be based on the record and the law that existed when that decision was made.

(2) Special rule for Board decisions issued on or after July 21, 1992. For a Board decision issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

(c) Errors that constitute clear and unmistakable error. To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.

(d) Examples of situations that are not clear and unmistakable error – (1) changed diagnosis. A new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision.

(2) Duty to assist. The Secretary's failure to fulfill the duty to assist.

(3) Evaluation of evidence. A disagreement as to how the facts were weighed or evaluated.

(e) Change in interpretation. Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision is challenged, there has been a change in the interpretation of the statuted or regulation.

STATEMENT OF THE CASE

1. Mr. Yates served in active duty with the U.S. Military from 1968 to 1970, during which time he suffered foot, ankle and shin injuries. In 1976, Mr. Yates filed a claim for service connection for a back disability which began during service. Mr. Yate's military medical records contained Army diagnostic codes relating to his in-service injuries. Such codes were not understandable without obtaining the corresponding Army regulations that translated such diagnostic codes. Mr. Yate's claim was denied because the Regional Office found there was no evidence of service connection.

In 1995, Mr. Yates filed an application to reopen his claim for service connection for a back disability. The Regional Office denied the claim to reopen, finding that no new and material evidence to reopen the claim had been submitted. Mr. Yates appealed this decision to the Board of Veteran Appeals and submitted the Army regulations that explained the diagnostic codes in his medical

records. Consequently, Mr. Yates's claim for service connection was granted and he was assigned a disability rating of 60% effective as of April 5, 1995.

In an attempt to get an earlier effective date for his grant of service connection and his 60 percent rating prior to April 5, 1995, Mr. Yates filed a claim of clear and unmistakable error with the Regional Office's 1976 decision which had previously denied service connection. Mr. Yates contended that had the RO consulted the Army regulations that explained the diagnostic codes in his medical records, his claim for service connection would have been granted in 1976 at the time he originally filed the claim. The Court of Appeals for Veteran Claims ("CAVC") rejected Mr. Yate's argument.

On Appeal to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), Mr. Yates argued that the CAVC misinterpreted Clear and Unmistakable Error by requiring a manifest error that would have changed the outcome of the decision. Specifically, Mr. Yates contended that such an interpretation conflicted with 38 U.S.C. § 5107(b), the statutory "benefit of the doubt" rule that imposes a much less burden of proof.

The Federal Circuit rejected Mr. Yates' argument. The Federal Circuit determined that Clear and Unmistakable Error requires a veteran to prove a manifestly different outcome. Moreover, the Federal Circuit held that § 5107(b) only provides the benefit of the doubt to a veteran if there is an approximate balance of positive and negative evidence. The Federal Circuit reasoned that no approximate balance of positive and negative evidence can ever exist in cases of clear and unmistakable evidence

claims, since a veteran is required to prove a manifestly different outcome to support a claim for CUE.

2. 38 U.S.C. § 5107 is entitled "Burden of proof; benefit of the doubt". It is the **only** statutory provision regarding the burden of proof that exists in veterans' benefits laws. Subsection (a) provides that a person who submits a claim has the burden of submitting evidence "sufficient to justify a belief" that the claim is well grounded. This burden has been defined as unique and uniquely low. *Hensley v. West*, 212 F.3d 1255, 1261 (Fed.Cir. 2000). Subsection (b) provides that whenever there is an approximate balance of negative and positive evidence regarding the merits of **any** issue material to the determination of the matter, the benefit of the doubt must be resolved in the veteran's favor. Accordingly, when the subsections are read together, § 5107 provides a low burden of proof for a veteran to meet in support of a claim, and then further provides that a veteran must be given the benefit of the doubt if his evidence in support of the claim is equal to that of the evidence against the claim.

Further support for the application of the "reasonable doubt" doctrine is found at 38 C.F.R. § 3.102. This regulation was promulgated by the Secretary in August of 1985 prior to the enactment of 38 U.S.C. § 5107. It states in pertinent part:

> It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts found in every case. When, after careful consideration of all procurable and assembled data, a **reasonable**

> **doubt** arises regarding service origin, the degree of disability, or **any other point**, such doubt **will be** resolved in favor of the claimant. (Emphasis added)

3. When a claim is denied by the Regional Office and the veteran fails to appeal that decision, the decision becomes final. Final decisions are accepted as correct unless a veteran can establish that the decision contains "clear and unmistakable error". The phrase "clear and unmistakable error" derives from 38 C.F.R. § 3.105(a), which provides that previous dispositions which are final and binding will be considered correct absent a showing of "clear and unmistakable error." The regulation does not provide a precise definition of "clear and unmistakable error", but both the Federal Circuit and the CAVC have provided a general outline of what constitutes CUE.[1] "We hold that to prove the existence of [clear and unmistakable error] as set forth in § 3.105(a), the claimant must show that an outcome-determinative error occurred, that is, an error that would manifestly change the outcome of a prior decision." *Bustos v. West*, 179 F.3d 1378, 1380 (Fed.Cir. 1999). "CUE is a very specific kind of error, of fact or law, that when called to the attention of the reviewers compels the conclusion, to which the reasonable minds could not differ, that the result would have been manifestly different but for the error." *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993).

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[1] Neither 38 U.S.C. § 5109A nor 38 U.S.C. § 7111, the statutes regarding CUE, contain a definition of "clear and unmistakable error".

Prior to 1997, when Congress enacted Pub. L. 105-111, 38 C.F.R. § 3.105 existed for decades without any statutory authority. However, in 1997, Congress decided to amend title 38 of the United States Code to add new sections. Specifically, 38 U.S.C. § 5109A was added to codify 38 C.F.R. § 3.105(a).

In essence, by the enactment of 38 U.S.C. § 5109A, Congress codified 38 C.F.R. § 3.105(a) a veteran's right to challenge the finality of a prior final Regional Office determination. Accordingly, § 5109A creates a statutory exception to the finality of agency determinations by allowing veterans to challenge the finality of regional office determinations. The actions of Congress must be interpreted to require that the Department is accountable for providing the veteran a full, complete and correct adjudication of his claim for benefits.

4. As stated *supra*, neither the regulation nor statute provide a reference or specify a "burden of proof" needed to demonstrate clear and unmistakable error nor do either exclude the concept of resolution of reasonable doubt within the plain language of the statute or the regulation. As such, the determination or interpretation of what constituted clear and unmistakable error was left to the CAVC and Federal Circuit until January 1999 when the Department of Veteran Affairs published final regulations concerning clear and unmistakable evidence in final Board of Veterans Appeals decisions.[2] The regulation

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[2] 38 C.F.R. § 20.1403(a) is a regulation interpreting 38 U.S.C. § 7111 and not § 5109A. *See* BVA/CUE regulations are presently the subject of legal challenge in the Federal Circuit Court of Appeals. *Disabled American Veterans, et al. v. Department of Veterans Affairs*, Fed.Cir. Nos. 99-7061, 99-7071, 99-7084, 99-7085.

provides a definition of what does and what does not constitute clear and unmistakable error. In essence, the regulation merely reiterates the case law defining clear and unmistakable error as the kind of factual or legal error that results in a manifestly different outcome. However, the 38 C.F.R. § 20.1403(a) only applies to clear and unmistakable evidence found in BVA, and not Regional Office, decisions.

REASONS FOR GRANTING THE WRIT

This Appeal challenges the interpretation made by the CAVC in *Russell v. Principi*, 3 Vet.App. 310 (1992) and the Federal Circuit in *Bustos v. West*, *supra*, of 38 C.F.R. § 3.105(a). The Petitioner specifically challenges the Federal Circuit's interpretation of 38 U.S.C. § 5107(b) as being non-applicable to consideration of claims made pursuant to 38 C.F.R. § 3.105(a). The CAVC, as well as the Federal Circuit, in their interpretations of § 3.105(a) have erroneously enhanced the burden of proof required to correct a prior Agency decision. The Federal Circuit has now expressly held that the "reasonable doubt doctrine" does not apply to the correction of prior Agency errors.

Since there exists no predicate statutory authority from Congress regarding the correction of prior error in an Agency decision, necessarily the Secretary created 38 C.F.R. § 3.105(a) pursuant to 38 U.S.C. § 501(a). This Court can infer that the Secretary deemed such regulation, "necessary or appropriate to carry out the laws administered by the Department." The reason for the creation of such a regulation was to ensure that Agency

decisionmaking had been correct, **and if not**, could be corrected. The Secretary prescribed that a decision was final **unless** there was clear and unmistakable evidence to indicate a prior decision had been made in error.

As with all things human, to err is to be anticipated. 38 C.F.R. § 3.105(a) provides a mechanism to "correct" prior error. The Secretary reasoned that such error should be **both** clear and unmistakable. But the Secretary's regulation does not, as the CAVC has held, contain any language requiring a claimant to demonstrate that the error committed would have resulted in a "manifestly different outcome." When Congress enacted 38 U.S.C. §§ 5109A and 7111, Congress likewise omitted any reference to a burden to be imposed upon a claimant to demonstrate a "manifestly different outcome."

The CAVC, nevertheless, in *Russell* interpreted 38 C.F.R. § 3.105(a) to mean that a "claimant" **must** demonstrate that the error was of such magnitude that it was not only "undebatable" but that the error had it not been committed would have resulted in a "manifestly different outcome." Such an interpretation is not consistent with the statutory scheme created by Congress. The Federal Circuit has consistently observed that the statutory scheme involving the adjudication of veterans' benefits claims is unique and mandates the adjudication of all veterans' claims under the principles of fundamental fairness. The character of the veterans' benefits statutes is strongly and uniquely pro-claimant. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed.Cir. 1998); *see also Hayre v. West*, 188 F.3d 1327, 1333-34 (Fed.Cir. 1999) (pointing out Congress's recognition of "the strongly and uniquely pro-claimant system of awarding benefits to veterans.").

Nolen v. Gober, ___ F.3d ___ No. 99-7173, slip op. pp. 7-8 (decided August 1, 2000). It is clear that Congress created a "uniquely pro-claimant system" for the adjudication of veterans' benefits claims. The CAVC's interpretation as adopted and approved by the Federal Circuit in *Bustos* is not "pro-claimant." To the contrary the interpretation of 38 C.F.R. § 3.105(a) is overtly adversarial.

The Petitioner contends that 38 U.S.C. § 5107 expresses the intent of Congress to require only a *de minimis* burden of proof and that the "resolution of reasonable doubt" is required to be applied in any matter, "material to the determination of the matter." The CAVC and the Federal Circuit misinterpret 38 C.F.R. § 3.105(a) by imposing a "burden of proof" in excess of that set out in 38 U.S.C. § 5107(a). The correction of a clear and unmistakable error in a prior Agency decision pursuant to 38 C.F.R. § 3.105(a) is a "matter" as contemplated by 38 U.S.C. § 5107(b). The Federal Circuit misinterprets the procedure to correct a prior error under 38 C.F.R. § 3.105(a). The Federal Circuit compounds this misinterpretation by interpreting 38 U.S.C. § 5107(b) too narrowly by focusing on the "approximate balance of evidence" language so as to limit the application of the "reasonable doubt" language in the statute. Such an interpretation renders the "reasonable doubt doctrine" inapplicable to the **matter** of the correction of a prior decision based upon clear and unmistakable error. The plain language of the regulation specifically states, "Where **evidence** establishes such error the prior decision **will be** reversed or amended." (Emphasis added)

This plain language must be read to contemplate the "consideration of all evidence and material of record"

and the consideration of whether there is an "approximate balance of positive and negative evidence." The imposition of the "manifestly different outcome" burden upon a claimant is not supported by the plain language of the regulation. Further, the Secretary in 38 C.F.R. § 3.102 clearly articulates the **defined policy** of the Department of Veterans Affairs to administer the law "under a broad interpretation, consistent, however, with the facts shown in every case." Such language clearly contemplates that consideration of prior error under 38 C.F.R. § 3.105(a) will be afforded the resolution of doubt in favor of the claimant. The Secretary has properly reflected the intent of Congress to apply the doctrine of "resolution of reasonable doubt" to **any other point** which necessarily includes the correction of prior error under 38 C.F.R. § 3.105(a). The Federal Circuit's interpretation undermines the intent of Congress and conflicts with the Secretary's interpretation of the principles of reasonable doubt. The CAVC and the Federal Circuit interpret the CUE regulation to require a claimant to demonstrate a "manifestly different outcome." Such an interpretation impermissibly shifts and imposes a burden upon a claimant, under 38 C.F.R. § 3.105(a) which exceeds the burden imposed by Congress in 38 U.S.C. § 5107(a) and disregards the benefit of the doubt doctrine imposed by 38 U.S.C. § 5107(b).

Why should the correction of an error by the Agency in a prior decision contain such an onerous burden? The Petitioner contends that the overriding consideration should be to ensure that every veteran receives every benefit to which he or she is entitled to under law at the earliest possible date. If an error was made, then it should

be recognized as such and corrected. It is not the role of the Agency or the Courts to create burdens or impose additional burdens upon a claimant. That is the role of Congress. Congress spoke clearly in 38 U.S.C. § 5107 regarding the burden of proof and the resolution of reasonable doubt in favor of the veteran.

By requiring a veteran to present evidence of a "manifestly different outcome" in order to correct an error in a prior Agency determination, the CAVC and Federal Circuit have created a more stringent burden of proof than the burden of proof contemplated by Congress. The judicially created burden of proof directly conflicts with the plain language of 38 U.S.C. § 5107(a) which is the **only** statutory provision regarding a veteran's burden of proof in the statutory scheme.

38 U.S.C. § 5107(a) provides that a veteran only has the burden of submitting evidence to well ground their claim. As stated *supra*, such a burden is unique and uniquely low. *Hensley*, 212 F.3d at 1261. A well-grounded claim is a plausible claim, one which is capable of substantiation; it need not be conclusive, but only possible. *Russo v. Brown*, 9 Vet.App. 46 (1996). 38 U.S.C. § 5107(b) provides that if the evidence in support of the claim is equal to that of the evidence against the claim, then the veteran must prevail. This subsection has been interpreted as meaning that a claim must be resolved in a veteran's favor unless the Agency concludes that a fair preponderance of evidence weighs against the claim. *See, Brown v. Brown*, 5 Vet.App. 413 (1993). In the context of correction of a prior Agency determination, pursuant to 38 C.F.R. § 3.105(a), the Petitioner contends that such a

matter should be resolved pursuant to 38 U.S.C. § 5107(b).

Clearly, § 5107 illustrates Congressional intent that a veteran's burden of proof in this unique system is to be low. Indeed, some cases interpret the statute to mean that the Agency has the burden of proof in order to defeat a claim. *See, Brown, supra.* The judicial and regulatory interpretation of clear and unmistakable evidence directly conflicts with § 5107 and its corresponding Congressional intent. In order to meet the burden established by the CAVC and the Federal Circuit of a "manifestly different outcome," a claimant must necessarily present substantially more evidence than is contemplated by 38 U.S.C. § 5107(a). In every other context, in the adjudication of every other matter, a claimant is only required to provide a "plausible claim" and thereafter is entitled to the benefit of the resolution of reasonable doubt in favor of the claimant.

The interpretations of the CAVC and the Federal Circuit of 38 C.F.R. § 3.105 directly conflict with 38 U.S.C. § 5107, which only requires a veteran to submit a plausible claim and which also provides the claimant the benefit of the resolution of reasonable doubt in favor of the matter.

CONCLUSION

This Court must correct this manifest injustice. The CAVC and the Federal Circuit misinterpret both the CUE regulation and statute when they impose a "manifestly different outcome" burden upon veterans in order to

correct a clear and unmistakable error made by the Agency. The Federal Circuit misinterpreted 38 U.S.C. § 5107(b) when it failed to recognize the conflict with the judicially created burden of "manifestly different outcome" and the statutory burden of proof created in § 5107(a) and the requirement in § 5107(b) to resolve reasonable doubt in favor of the veteran. For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

United States Court of Appeals,
Federal Circuit.
Steven M. YATES, Claimant-Appellant,

v.

Togo D. WEST, Jr., Respondent-Appellee.

No. 00-7014.

Steven M. Yates, pro se of Las Vegas, Nevada.

Michael S. Dufault, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, for respondent-appellee. With him on the brief were David W. Ogden, Acting Assistant Attorney General, David M. Cohen, Director, and Kathryn A. Bleecker, Assistant Director. Of counsel on the brief were Richard J. Hipolit, Deputy Assistant General Counsel, and Sheldon Bolasny, Attorney, Department of Veterans Affairs, of Washington, DC.

Before MICHEL, LOURIE, and RADER, Circuit Judges.

LOURIE, Circuit Judge.

Steven P. Yates appeals from the judgment of the United States Court of Appeals for Veterans Claims affirming the decision of the Board of Veterans' Appeals denying Yates' claim of clear and unmistakable error in a 1976 Department of Veterans Affairs regional office ("RO") claim decision. *See Yates v. West*, No. 98-1336, 1999 WL 542182 (July 21, 1999). We affirm.

BACKGROUND

Yates served in the military from 1968 to 1970, during which time he was treated for foot, ankle, and shin pain. His medical records included certain diagnostic codes that were not understandable to a lay person. In 1976, Yates filed a claim for service connection for a back disability that allegedly began during service. The RO denied his claim, finding no evidence of service connection. The RO's decision did not address the diagnostic codes in the medical records.

In April 1995, Yates filed an application to reopen his claim for service connection for a back condition. The RO denied the claim, finding no new and material evidence of service connection. Yates then appealed to the Board and submitted numerous records, including excerpts from Army regulations that explained the diagnostic codes in his medical records. Yates was given a medical examination, which revealed that he had a congenital back abnormality that was probably exacerbated during his service. The RO awarded Yates a disability rating of 60 percent, effective April 5, 1995.

Yates thereafter filed a claim of clear and unmistakable error in the RO's 1976 decision, arguing that had the RO consulted the Army regulations that explained the diagnostic codes in his medical records, the RO would have found his disability to be service connected. The RO denied Yates' claim and the Board affirmed. The Court of Appeals for Veterans Claims, however, remanded because the Board failed to address the merits of Yates' argument. On remand, the Board found that the RO's apparent failure to consult the Army regulations did not rise to the

level of clear and unmistakable error. The Court of Appeals for Veterans Claims affirmed the Board's decision, finding that the Army regulations did not compel a different result because reasonable minds could still differ as to the interpretation of the medical records. Yates timely appealed to this court in accordance with 38 U.S.C. § 7292 (1994).

DISCUSSION

Our jurisdiction to review a judgment of the Court of Appeals for Veterans Claims, set forth in 38 U.S.C. § 7292, is highly circumscribed. *See Helfer v. West*, 174 F.3d 1332, 1335 (Fed.Cir.1999). "[A]ny party . . . may obtain a review of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court [of Appeals for Veterans Claims] in making the decision." 38 U.S.C. § 7292(a) (1994). We must decide "all relevant questions of law, including interpreting constitutional and statutory provisions," and

> hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for the Veterans Claims that [we] find to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

Id. § 7292(d)(1). However, "[e]xcept to the extent that an appeal . . . presents a constitutional issue, [we] may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2).

On appeal, Yates argues that the Court of Appeals for Veterans Claims erred in interpreting "clear and unmistakable error" to require a manifest error that would have changed the outcome of the decision. Yates argues for a more lenient standard that would take into consideration the "benefit of the doubt" rule of 38 U.S.C. § 5107(b) (1994). The government responds that the court applied the proper test and that the determination whether the RO's failure to consider the Army regulations was a manifest error that was outcome determinative in this case here is a factual issue over which we do not possess jurisdiction.

We have jurisdiction over this appeal because it raises a challenge concerning the interpretation of the "clear and unmistakable error" regulation that was relied on by the Court of Appeals for Veterans Claims. *See Smith v. West*, 214 F.3d 1331, 1333 (Fed.Cir.2000). However, we agree with the government that the Court of Appeals for Veterans Claims correctly interpreted "clear and unmistakable error." Section 3.105(a) of 38 C.F.R. requires that "[p]revious determinations which are final and binding, including decisions of service connection, . . . be accepted as correct in the absence of clear and unmistakable error." (emphasis added). In *Bustos v. West*, 179 F.3d 1378, 1380

(1999), we upheld that court's interpretation that "clear and unmistakable error" requires that the error be outcome-determinative as consistent with 38 C.F.R. § 3.105(a). "We . . . hold that, to prove the existence of [clear and unmistakable error] as set forth in § 3.105(a), the claimant must show that an outcome-determinative error occurred, that is, an error that would manifestly change the outcome of a prior decision." *Id.*

Moreover, in January 1999, the Department of Veterans Affairs published final regulations concerning revision of Board decisions on grounds of clear and unmistakable error, *see* 64 Fed.Reg. 2134 (1999), now contained in Subpart O of 38 C.F.R. Part 20 (Board of Veterans' Appeals: Rules of Practice, Subpart O – Revision of Decisions on Grounds of Clear and Unmistakable Error). "Clear and unmistakable error" is defined as follows:

> (a) General. Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.
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>
> (c) Errors that constitute clear and unmistakable error. To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error of the Board's adjudication of the appeal which, had it

> not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.
>
> (d) Examples of situations that are not clear and unmistakable error. –
>
> (1) Changed diagnosis. A new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision.
>
> * * *
>
> (3) Evaluation of evidence. A disagreement as to how the facts were weighed or evaluated.

38 C.F.R. § 20.1403 (1999). The new regulations also state that the "benefit of the doubt" rule of 38 U.S.C. § 5107(b) does not apply to a motion for revision on the ground of clear and unmistakable error. *See* 38 C.F.R. § 20.1411(a) (1999).

These regulations are consistent with our holding in *Bustos*. In fact, we find that they are reasonable and not inconsistent with any provision of law. They are especially not inconsistent with the "benefit of the doubt" rule of 38 U.S.C. § 5107(b), as asserted by Yates, because that rule only comes into play "[w]hen, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter. . . . " 38 U.S.C. § 5107(b). In contrast, the "clear and unmistakable error" provision applies when the facts "compel[ ] the conclusion, to which reasonable minds could not differ,

that the result would have been manifestly different but for the error." 38 C.F.R. § 20.1403(a) (1999). That is not a "balance of evidence" situation.

Whether the RO's failure to consider the Army regulations would constitute clear and unmistakable error as defined above is fact-based and hence beyond our jurisdiction. *See Glover v. West*, 185 F.3d 1328 (1999). Because the Court of Appeals for Veterans Claims' interpretation of "clear and unmistakable error" was in accordance with the statute and regulations, the decision is

AFFIRMED.

APPENDIX 2

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

United States Court of Appeals for Veterans Claims.
Steven M. YATES, Appellant,

v.

Togo D. WEST, Jr., Secretary of Veterans Affairs, Appellee.

No. 98-1336.

July 21, 1999.

Before HOLDAWAY, Judge.

MEMORANDUM DECISION

HOLDAWAY.

The appellant, Steven M. Yates, appeals a July 1998 decision of the Board of Veterans' Appeals (BVA or Board) which denied an earlier effective date for his back condition based on a claim for clear and unmistakable error (CUE). The pro se appellant has filed a brief and the Secretary has filed a motion for summary affirmance. The Court has jurisdiction of the case under 38 U.S.C. § 7252(a). For the following reasons, the Court will grant the Secretary's motion and affirm the decision of the Board.

I. FACTS

The appellant served on active duty from August 1968 to July 1970. His entrance examination did not report any previous history of back problems. In September 1968, the appellant sought treatment for stabbing pain in his left ankle and leg. A medical officer then completed a physical profile report which stated that the appellant was medically qualified for duty with specified limitations. The report noted a current "L" or lower body injury described as "T-3," and indicated the following limits: "Code C: No crawling, stooping, running[,] jumping, prolonged standing[,] or marching." A few days later, a medical treatment report noted that the appellant had an "L-3 profile" and for five days was placed on "Code C." The next treatment report stated, "Trainee has same problem as above with both shins." His service medical records did not reflect any other treatment for a back condition.

In October 1976, the appellant filed a claim for compensation for a back condition. At that time, he stated that he first began experiencing problems with his back during service. In support of his claim, he submitted a medical report from the Northwest Industrial Medical Clinic which established a current diagnosis of "Transitional lumbosacral vertebra with pseudoarthrosis" and "Narrowing L-S interspace." Dr. Robert F. Corkle, who signed this report, indicated that the appellant had denied any previous history of back problems. The appellant also submitted a letter from the U.S. Postal Service which stated that the appellant was "found medically ineligible" for employment as a mail handler. Later in

October 1976, a VA regional office (VARO) denied the appellant's claim for compensation on the grounds that his service medical records were negative for treatment of a back condition.

In April 1995, the appellant attempted to reopen his claim for a back condition. In support of his claim, the appellant submitted a voluminous appendix of evidence, including Army regulations, current medical treatment reports, and treatise evidence. In July 1996, VA provided the appellant with a medical examination conducted by Dr. S. Hunt. The appellant reported to Dr. Hunt that he began to experience back problems in his youth which were aggravated by military service. Dr. Hunt noted that the appellant had a congenital abnormality with his back and concluded, "It does seem likely that there would have been exacerbation of the preexisting condition with his various impact type activities in the service." On the basis of the examination and the other evidence submitted by the appellant, the VARO awarded the claim and assigned a 60% disability rating.

In September 1996, the appellant filed a claim for CUE in the October 1976 VARO decision. In October 1996, the VARO determined that CUE did not exist in the October 1976 VARO decision. The appellant then filed an appeal to the Board. In April 1997, the Board affirmed the decision of the VARO. The appellant then appealed to this Court. In April 1998, this Court remanded the appellant's claim back to the Board because it had failed to provide adequate reasons and bases for its decision. Specifically, the Court found that the Board had failed to consider whether or not the VARO's failure to consider certain Army regulations which explained the notations

in the appellant's service medical records could constitute CUE.

On remand, the Board acknowledged that the VARO had failed to obtain the pertinent Army regulations which describe the notations in the appellant's service medical records. However, the Board concluded that this error did not rise to the level of CUE because it is unclear whether these regulations would have manifestly changed the outcome of his claim.

II. ANALYSIS

When a claim is denied by the VARO and the claimant fails to appeal that decision as prescribed by 38 U.S.C. § 7105(b)(1), that decision becomes final. 38 U.S.C. § 7105(c). In the absence of new and material evidence, decisions which are "final and binding . . . will be accepted as correct in the absence of clear and unmistakable error." 38 C.F.R. § 3.105(a) (1996), accord *Person v. Brown*, 5 Vet.App. 449 (1993).

To establish a valid CUE claim, a claimant must show that "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied." *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc). The appellant cannot merely disagree with the way the facts were weighed or evaluated. *Id., see also Daniels v. Gober*, 10 Vet.App. 474 (1997). "CUE is a very specific kind of error, of fact or law, that when called to the attention of the reviewers compels the conclusion, to which the reasonable minds could not differ, that the result would have

been manifestly different but for the error." *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993).

In his brief, the appellant argues that the October 1976 VARO decision was clearly and unmistakably erroneous because it found that the appellant's service medical records did not note that he had a back condition in service. In support of his contentions, he points to a specific Army regulation, AR 40- 501, which describes the notations in his service medical records. Specifically, AR 40-501 argues that a designation of treatment for "L" means that he was treated for a lower back condition. However, the appellant acknowledges that AR 40-501 states that L is code for "lower extremities" which includes the feet, legs, pelvic area, lower back, and lower spine. Furthermore, the Court finds that at the time of this notation, the appellant was receiving treatment for an ankle or leg injury. Therefore, even if the VARO had considered the AR 40-501, the appellant has not shown that the result would have been manifestly different, as required for CUE claims. Certainly there would have been a plausible basis in the record for a finding that the appellant did not suffer from a back condition based on that evidence, and the "L" notation referred to his foot or leg condition for which he had been receiving treatment. It was not until the July 1996 medical examination by Dr. Hunt that the appellant established service connection for his back condition. Of course this evidence was not before the adjudicator in October 1976 and may not be the basis for a claim of CUE. Since the appellant has failed to show CUE in the October 1976 decision, the decision of the Board must be affirmed.

III. CONCLUSION

After consideration of the pleadings and a review of the record, the Court holds that the appellant has not demonstrated that the Board committed either legal or factual error which would warrant reversal or remand. The Court is also satisfied that the Board decision fulfills the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1). *See Gilbert v. Derwinski,* 1 Vet.App. 49 (1990). Summary disposition is appropriate. *See Frankel v. Derwinski,* 1 Vet.App. 23 (1990).

The Secretary's motion is granted and the decision of the Board is AFFIRMED.